

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON L. SANDERS,

Petitioner,

Case No. 1:20-cv-872

v.

Honorable Paul L. Maloney

HEIDI WASHINGTON et al.,

Respondent.

OPINION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court will dismiss the petition without prejudice for failure to exhaust available state-court remedies.

Discussion

I. Factual allegations

Petitioner Jason L. Sanders is incarcerated with the Michigan Department of Corrections at the Bellamy Creek Correctional Facility (IBC) in Ionia, Ionia County, Michigan. Petitioner pleaded guilty in the Ionia County Circuit Court to malicious destruction of personal property valued at \$1,000 to \$20,000, in violation of Mich. Comp. Laws § 750.377a. On September 2, 2008, the court sentenced Petitioner to a sentence of 1 to 5 years, to be served consecutively to sentences Petitioner was serving either in prison or on parole when he committed the malicious-destruction crime. Those sentences include a sentence of 2 to 20 years imposed by the Oakland County Circuit Court on November 8, 2000, for armed robbery following Petitioner's guilty plea to that offense, and a sentence of 1 year, 6 months to 22 years, 6 months imposed by the Oakland County Circuit Court on September 5, 2000, for second-degree home invasion following Petitioner's guilty plea to that offense.

The Michigan Department of Corrections reports that Petitioner's earliest release date was September 1, 2009, and his maximum discharge date is June 16, 2025. *See* <https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=305405> (visited September 11, 2020). Those dates suggest that the Oakland County sentences are concurrent to each other and that the Ionia County sentence is consecutive to the Oakland County sentences. The Ionia County Circuit Court case details, available at <https://micourt.courts.michigan.gov/casesearch/Terms?ReturnUrl=%2Fcasesearch%2FCourt%2FC08~1%2FSearch%3FSearchText%3Djason%2Bsanders> (visited Sept. 11, 2020), expressly state that the Ionia sentence is consecutive to Petitioner's other sentences.

Pursuant to Michigan Department of Corrections policy directive, “if an offender is serving consecutive sentences, none of the sentences that are part of the consecutive string shall be terminated until all sentences in that string have been served.” Michigan Department of Corrections Policy Directive 03.01.135 (eff. Apr. 15, 2019). Working backward from Petitioner’s maximum discharge date, it is apparent that the only sentence remaining to be served is Petitioner’s sentence for malicious destruction of property. Although Petitioner has not been discharged from his other sentences, and they have not been terminated, it appears they have expired.

Petitioner does not provide any factual details regarding the malicious-destruction-of-property crime. He does note that he never appealed the conviction or sentence, nor did he pursue a motion for relief from judgment.

On September 1, 2020, Petitioner filed his habeas corpus petition raising four grounds for relief, as follows:

- I. Under “truth [in] sentencing” prisoners were supposed to be released on parole after completing their minimum.
- II. Due to the COVID-19 pandemic and my terminal illnesses, if contracted, I will die.
- III. The continued imprisonment in this prison environment during the pandemic increases the fact that I will soon contract it and die.
- IV. COVID-19 poses a threat (high risk) [to Petitioner] Sanders life.

(Pet., ECF No.1, PageID.6-10.)

II. Exhaustion of State Court Remedies

Before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to “fairly present” federal claims so that state courts have a “fair opportunity” to apply controlling legal principles to the facts bearing

upon a petitioner's constitutional claim. *Id.* at 844, 848; *see also Picard v. Connor*, 404 U.S. 270, 275-77 (1971); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). To fulfill the exhaustion requirement, a petitioner must have fairly presented his federal claims to all levels of the state appellate system, including the state's highest court. *O'Sullivan*, 526 U.S. at 845; *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990). The district court can and must raise the exhaustion issue *sua sponte* when it clearly appears that habeas claims have not been presented to the state courts. *See Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987); *Allen*, 424 F.2d at 138-39.

Petitioner bears the burden of showing exhaustion. *See Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Petitioner acknowledges that he has not raised any of these issues in the state courts. An applicant has not exhausted available state remedies if he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c). The Court will address the state court procedures available to present Petitioner's substantive challenge to his conviction for malicious destruction of property (habeas issue I) and his challenges to the constitutionality of his sentence in light of the COVID-19 pandemic (habeas issues II-IV) separately.

A. Substantive challenge to the malicious destruction of property conviction

Petitioner has at least one available procedure by which to raise his substantive challenge to the malicious destruction of property conviction. He may file a motion for relief from judgment under Mich. Ct. R. 6.500 *et seq.* Under Michigan law, one such motion may be filed after August 1, 1995. Mich. Ct. R. 6.502(G)(1). Petitioner has not yet filed his one allotted motion. Therefore, the Court concludes that he has at least one available state remedy. To properly exhaust his claim, Petitioner must file a motion for relief from judgment in the Ionia County Circuit Court.

If his motion is denied by the circuit court, Petitioner must appeal that decision to the Michigan Court of Appeals and the Michigan Supreme Court. *O’Sullivan*, 526 U.S. at 845; *Hafley*, 902 F.2d at 483 (“[P]etitioner cannot be deemed to have exhausted his state court remedies as required by 28 U.S.C. § 2254(b) and (c) as to any issue, unless he has presented that issue both to the Michigan Court of Appeals and to the Michigan Supreme Court.”) (citation omitted).

Because Petitioner has failed to exhaust his claims, his petition is properly dismissed without prejudice. The habeas statute imposes a one-year statute of limitations on habeas claims. *See* 28 U.S.C. § 2244(d)(1). With regard to Petitioner’s substantive challenge to his malicious-destruction-of-property conviction, Petitioner’s period of limitation commenced running on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

Petitioner was sentenced on September 2, 2008. He did not file a direct appeal of his conviction to either the Michigan Court of Appeals or the Michigan Supreme Court. Where a petitioner has failed to properly pursue an avenue of appellate review available to him, the time for seeking review at that level is counted under § 2244(d)(1)(A). *See* 28 U.S.C. § 2244(d)(1)(A) (time for filing a petition pursuant to § 2254 runs from “the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review.*”) (emphasis added). Under Michigan Court Rule 7.205(F)(3), at that time, Petitioner had one year, until September 2, 2009, in which to file a delayed application for leave to appeal in the Michigan Court of Appeals. Because Petitioner failed to file a timely appeal to the Michigan Court of Appeals, his conviction became final when his time for seeking review in that court expired. *See Williams v. Birkett*, 670 F.3d 729, 731 (6th Cir. 2012) (holding that a defendant’s conviction became final when the time for seeking review under Mich. Ct. R. 7.205(F)(3) expired); *see also*

Gonzalez v. Thaler, 565 U.S. 134, 152-53 (2012) (holding that, because the Supreme Court can review only judgments of a state’s highest court, where a petitioner fails to seek review in the state’s highest court, the judgment becomes final when the petitioner’s time expires for seeking state-court review). One year after that date, on September 2, 2010, the period of limitation expired. The petitioner, therefore, appears to be untimely by more than a decade.

In *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002), the Sixth Circuit considered what action the court should take if the dismissal of a petition for failure to exhaust could jeopardize the timeliness of a subsequent petition.¹ The Court stated that if the dismissal of the petition occurred with less than sixty days remaining in the period of limitation, the Court could protect the timeliness of a subsequent petition by staying the proceedings and holding them in abeyance pending exhaustion of state court remedies. Here, however, dismissal of the petition would have no impact on the timeliness of a subsequent petition. Therefore, a stay of these proceedings is not warranted, and Petitioner’s substantive challenge to his conviction is properly dismissed for failure to exhaust available state-court remedies.

B. Petitioner’s COVID-19 claims for relief

The grounds for relief Petitioner presents in habeas issues II-IV are not the types of claims typically presented in a habeas petition. The Supreme Court has made clear that constitutional challenges to the fact or duration of confinement are the proper subject of a habeas corpus petition rather than a complaint under 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). Constitutional challenges to the conditions of confinement, on the other hand, are proper subjects for relief under 42 U.S.C. § 1983. *Id.* The *Preiser* Court, however, did not

¹The *Palmer* court considered the issue in the context of a “mixed” petition including exhausted and unexhausted claims. The *Palmer* court’s explanation of when dismissal of a petition does not jeopardize the timeliness of a subsequent petition, however, is persuasive even where the petition includes only unexhausted claims.

foreclose the possibility that habeas relief might be available even for conditions of confinement claims:

This is not to say that habeas corpus may not also be available to challenge such prison conditions. *See Johnson v. Avery*, 393 U.S. 483, (1969); *Wilwording v. Swenson*, *supra*, at 251 of 404 U.S. . . . When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal. *See Note, Developments in the Law—Habeas Corpus*, 83 Harv. L. Rev. 1038, 1084 (1970).[]

Preiser, 411 U.S. at 499 (footnote omitted).

But, the Court has also never upheld a “conditions of confinement” habeas claim. Indeed, in *Muhammad v. Close*, 540 U.S. 749 (2004), the Court acknowledged that it had “never followed the speculation in *Preiser* . . . that such a prisoner subject to ‘additional and unconstitutional restraints’ might have a habeas claim independent of § 1983” *Id.* at 751 n.1.

The Sixth Circuit has concluded that claims regarding conditions of confinement are properly brought under § 1983 and are not cognizable on habeas review. *See Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (“Petitioner in this case appears to be asserting the violation of a right secured by the federal Constitution or laws by state prison officials. Such a claim is properly brought pursuant to 42 U.S.C. § 1983.”); *In re Owens*, 525 F. App’x 287, 290 (6th Cir. 2013) (“The criteria to which Owens refers involves the conditions of his confinement This is not the proper execution of sentence claim that may be pursued in a § 2254 petition.”); *Hodges v. Bell*, 170 F. App’x 389, 392-93 (6th Cir. 2006) (“Hodges’s complaints about the conditions of his confinement . . . are a proper subject for a § 1983 action, but fall outside of the cognizable core of habeas corpus relief.”); *Young v. Martin*, 83 F. App’x 107, 109 (6th Cir. 2003) (“It is clear under current law that a prisoner complaining about the conditions of his confinement should bring suit under 42 U.S.C. § 1983.”).

Petitioner's claims regarding the constitutionality of his custody in the prison because of risks posed by COVID-19 are principally claims regarding the conditions of his confinement. Such claims should be raised by a complaint for violation of 42 U.S.C. § 1983.

Nonetheless, Petitioner requests release from custody. That relief is available only upon habeas corpus review. "The Supreme Court has held that release from confinement—the remedy petitioner[] seek[s] here—is 'the heart of habeas corpus.'" *Wilson v. Williams*, 961 F.3d 829, 868 (6th Cir. 2020) (quoting *Preiser*, 411 U.S. at 498).² A challenge to the fact or duration of confinement should be brought as a petition for habeas corpus and is not the proper subject of a civil rights action brought pursuant to § 1983. *See Preiser*, 411 U.S. at 484 (the essence of habeas corpus is an attack by a person in custody upon the legality of that custody and the traditional function of the writ is to secure release from illegal custody).

In *Wilson*, the Sixth Circuit stated: "[o]ur precedent supports the conclusion that where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement." *Wilson*, 961 F.3d at 838. Petitioner, like the petitioners in *Wilson*, contends there are no conditions of confinement sufficient to prevent irreparable injury at the facility where he is housed. Accordingly, the Court construes his claim as a proper claim for habeas relief. Nonetheless, because Petitioner has chosen to pursue relief by way of a habeas petition, the available relief is circumscribed. *Wilson*, 961 F.3d at 837. Even if there might be conditions of confinement, short of release, that would mitigate the risk—and eliminate the cruel or unusual

² The *Wilson* petitioners were federal prison inmates who brought habeas claims under 28 U.S.C. § 2241 similar to those claims brought by Petitioner.

character of the punishment—it is not within this Court’s habeas jurisdiction to grant such relief.

Id. A claim seeking relief other than release is properly brought under 42 U.S.C. § 1983.

Although Petitioner’s COVID-19 claims are not typical of most § 2254 petitions, he must satisfy the requirements of § 2254, including the exhaustion requirement. Petitioner has neither alleged that he exhausted his claims in the state courts nor has he provided any documentation indicating that he has pursued any such state remedies.³ Subsection (b) of § 2254 precludes the Court from granting habeas relief unless Petitioner has exhausted his claims in state court. A petitioner’s failure to exhaust may be excused if “there is an absence of State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B). Petitioner does not claim that there is an absence of state corrective process. Instead, by referencing the imminent danger he faces, Petitioner presumably intends to invoke the latter exception: that circumstances have made the state’s corrective process ineffective. However, he has failed to allege how the present circumstances have rendered state court remedies ineffective.

Petitioner has at least one available procedure by which to raise the issues he has presented in this application, a motion for relief from judgment under Mich. Ct. R. 6.500 *et seq.* Additionally, relief may be available to Petitioner by way of a habeas corpus petition in state court in that he seeks a determination “whether his continued custody is legal.” *Phillips v. Warden, State Prison of S. Mich.*, 396 N.W.2d 482, 486 (Mich. Ct. App. 1986). Alternatively, Petitioner may seek relief, even release, by civil action in state court for unconstitutional conditions of confinement. *See Kent Cnty. Prosecutor v. Kent Cnty. Sheriff*, 409 N.W.2d 202, 208 (Mich. 1987)

³ Indeed, given the recency of the events giving rise to Petitioner’s grounds II-IV, it would appear to be impossible for Petitioner to have exhausted state court remedies before filing the petition.

(“No one now doubts the authority of courts to order the release of prisoners confined under conditions violating their Eighth and Fourteenth Amendment rights.”). Therefore, the Court concludes that he has at least one available state remedy.

To properly exhaust his claim, Petitioner must present his claim to each level of the state court system. *O’Sullivan*, 526 U.S. at 845; *Hafley*, 902 F.2d at 483 (“[P]etitioner cannot be deemed to have exhausted his state court remedies as required by 28 U.S.C. § 2254(b) and (c) as to any issue, unless he has presented that issue both to the Michigan Court of Appeals and to the Michigan Supreme Court.”) (citation omitted).

Because Petitioner has failed to exhaust his claims, his petition is properly dismissed without prejudice. As noted above, the habeas statute imposes a one-year statute of limitations on habeas claims. *See* 28 U.S.C. § 2244(d)(1). With regard to Petitioner’s COVID-19 claims, Petitioner’s period of limitation commenced running when “the factual predicate of his claim . . . could have been discovered through the exercise of reasonable diligence.” 28 U.S.C. §2244(d)(1)(D). Certainly, Petitioner could not have discovered his claim before March of this year.

The limitations period is not tolled during the pendency of a federal habeas petition. *Duncan*, 533 U.S. at 181-82. However, the period is tolled while an application for state post-conviction or collateral review of a claim is pending. 28 U.S.C. § 2244(d)(2). The statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until a decision is issued by the state supreme court. *Lawrence v. Florida*, 549 U.S. 327 (2007). The *Palmer* stay and abeyance remedy is, therefore, not appropriate with regard to these claims either. The *Palmer* court concluded that if the petitioner had more than 60 days remaining in the period of limitation—30 days to raise his unexhausted claims and 30 days after exhaustion

to return to the court—no additional protection, such as a stay, was warranted. *Id.*; *see also Rhines v. Weber*, 544 U.S. 269, 277 (2007) (approving stay-and-abeyance procedure); *Griffin v. Rogers*, 308 F.3d 647, 652 n.1 (6th Cir. 2002).

Petitioner has far more than sixty days remaining in his limitations period. If Petitioner diligently pursues his state-court remedies and promptly returns to this Court after the Michigan Supreme Court issues its decision, he is not in danger of running afoul of the statute of limitations. Therefore, a stay of these proceedings is not warranted, and the Court will dismiss the petition for failure to exhaust available state-court remedies.

III. Certificate of appealability

Under 28 U.S.C. § 2253(c)(2), the Court must also determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.*

The Court has concluded that Petitioner’s application is properly denied for lack of exhaustion. Under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only “when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Both showings must be made to warrant the grant of a certificate. *Id.*

The Court finds that reasonable jurists could not find it debatable whether Petitioner's application should be dismissed for lack of exhaustion. Therefore, a certificate of appealability will be denied. Moreover, for the same reasons the Court will deny a certificate of appealability, the Court also concludes that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Conclusion

The Court will enter an order and judgment dismissing the petition for failure to exhaust state-court remedies and denying a certificate of appealability.

Dated: September 16, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge